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SHORT TITLE Saville, Raymond L. DOCKETED: Jun 19 1985
VERSUS Westinghouse Elec. Corp.

Entry	Date	Note	Proceedings and Orders
1	Jun 19 1985	D	Petition for writ of certiorari filed.
2	Jul 22 1985		Brief of respondent United Electrical Radio and Machine Workers, Local 107 in opposition filed.
3	Jul 24 1985		DISTRIBUTED. September 30, 1985
4	Jul 22 1985		Brief of respondent Westinghouse Electric Corp. in opposition filed.
6	Oct 7 1985		REDISTRIBUTED. October 11, 1985
7	Oct 15 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

84-2034

No.

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FILED
JUN 10 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAYMOND L. SAVILLE, JR.,

Petitioner

vs.

WESTINGHOUSE ELECTRIC CORP.
and UNITED ELECTRICAL, RADIO
AND MACHINE WORKERS OF AMERICA
LOCAL 107,

Respondents

DONALD M. MCCURDY
221 N Olive St.
Media, PA 19063
(215) 566-8121

DAVID R. BLACK
221 N Olive St.
Media, PA 19063
(215) 566-8121
Attorney for
Petitioner

34pp

QUESTIONS PRESENTED

Whether this C urt's adoption of a six-month statute of limitations in Del Costello v. International Brotherhood of Teamsters, shoud be applied retroactively to a case in which previous statute of limitations had been six years.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAYMOND L. SAVILLE, JR.,

Petitioner

vs.

WESTINGHOUSE ELECTRIC CORP. and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 107,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Raymond L. Saville, Jr. hereby petitions that a Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on March 21, 1985.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit, issued without opinion, is set forth in the appendix at pages App. 1-2. The opinion of the United States District Court for the Eastern District of Pennsylvania is printed in the appendix at pages App. 3-7.

JURISDICTION

The Third Circuit's judgment was entered on March 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved herein are the National Labor Relations Act, 29 U.S.C. § 160(b), which provides in pertinent part: "No complaint shall issue based upon any unfair labor practice occurring

more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...."; and a Pennsylvania statute: Judiciary and Judicial Procedure, 42 Pa. C.S.A. § 5527(2): "The following actions and procedings must be commenced within six years: ...an action upon a contract, obligation or other liability founded upon a bond, note or other instrument in writing...."

STATEMENT OF THE CASE

Petitioner, Raymond L. Saville, Jr. brought this action charging that Respondent Westinghouse, his former employer, had breached a collective bargaining agreement, and that Respondent Electrical Workers, his former union, had breached its duty of fair representation by

mishandling the ensuing grievance proceedings. Jurisdiction of the United States District Court was predicated upon diversity of citizenship, 28 U.S.C. 1332.

Mr. Saville was employed by Westinghouse from March 3, 1969 until he was summarily terminated January 12, 1979. He worked as a machine operator and, later, in the maintenance department. During his employment, Saville became and remained a member in good standing of the Electrical Workers, the union which represented all employees at Westinghouse.

A collective bargaining agreement existed between the Company and the Union. This agreement regulated and governed the terms of employment for the employees such as Mr. Saville. It included specific grievance/arbitration procedures for resolving employment disputes. Under these procedures, the

Electrical Workers was designated exclusive representative of the employees.

Under the collective bargaining agreement, Westinghouse and Electrical Workers also agreed not to discriminate against employees because of race, creed, color, sex, age, or national origin. From time to time during Saville's employment, the Company elaborated upon this commitment in its published personnel guidelines. One of these, the "Reaffirmation of the Handicapped/Veterans' Policies" stated:

> It is the policy of Westinghouse to employ qualified individuals without regard to physical or mental handicaps or degree of handicap which are not relevant to satisfactory job performance. Westinghouse will take affirmative action to employ and advance in employment handicapped individuals at all levels of employment including the executive level, and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap at all employment practices such as the following: hiring, upgrading, demotion or transfer; recruitment or recruiting advertising;

layoff or termination; rates of pay or other forms of compensation; selection for training.

At the time he was hired by Westinghouse, and at all times during his employment, Saville suffered from a mental handicap. During his employment he was hospitalized and diagnosed by treating psychiatrists as suffering from manic and depressive illness. This condition can be controlled by medication. When not controlled, however, its symptoms include agitation, restlessness and poor impulse-control.

The Company was aware of Saville's handicap and on at least one occasion accorded disability benefits to him when his condition rendered him temporarily unable to work. In January, 1979, however, when Saville again began suffering from the symptoms of his illness, the Company chose to summarily fire him for

"unsubordination" rather than pay additional benefits for his disability.

Saville filed a grievance through the Electrical Workers under the collective bargaining agreement. When Westinghouse failed to address this grievance, Saville asked the Union to take his case to arbitration. This the Union promised to do. However, when Saville made inquiries about the status of his case more than a year after he was terminated, he was informed by the Union that it had decided not to take his case to arbitration.

This civil action was thereafter commenced May 25, 1984. After a Complaint was filed, Westinghouse and the Electrical Workers filed Motions to Dismiss, raising the question which is being presented to the Court in this Petition. The United States District Court, per the

Honorable Charles R. Weiner, granted those motions and dismissed the Complaint.

REASONS FOR GRANTING THE WRIT

This is an important case involving a question about which the Federal Courts of Appeals are in serious conflict. In Perez v. Dana Corp. Parish Frame Div., 718 F. 2d 581 (3d Cir. 1983) the Third Circuit has concluded that the decision of this Court in Del Costello v. International Brotherhood of Teamsters, ____U.S. ____, 103 S.Ct. 2281 (1983) should be applied retroactively to bar a cause of action which arose long before Del Costello was decided. This decision, while constituting binding precedent within the Third Circuit, is in direct conflict with the position adopted by the Ninth Circuit in Edwards v. Teamsters Local Union No. 36, 719 F. 2d 1036 (1983), and with lower courts in other circuits. See Woolett v. Bankers Life

Company, 572 F. Supp. 650 (E.D. Mich. 1983). Given the paramount importance of maintaining uniformity of decision among various federal circuits, and given this Court's interest, expressed in Del Costello, of providing for uniform treatment of similar labor disputes, the issue presented in this case is one of exceptional importance meriting review by this Court.

Causes of action such as Mr. Saville's have been dubbed, succinctly, "hybrid 301-fair representation claims." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967). Until recently such actions were thought to be governed not by federal statutes of limitations, but by limitations statutes of the forum state most closely analogous to a Plaintiff's 301-fair representation claim. Until Del

Costello v. International Brotherhood of Teamsters, U.S. ____ 103 S.Ct. 2281 (1983) was decided, the Courts in Pennsylvania uniformly applied the Pennsylvania statute of limitations governing written agreements. See 42 Pa. C.S.A. 5527(2). This limitations period is six years. Sellers v. Spiegel, Inc., 551 F. Supp. 235 (1982); Falsetti v. Local Union No. 2026, U.M.W., 249 F. Supp. 970 (1965), aff'd 355 F. 2d 658 (3d Cir. 1966) see Melin v. Arcata Graphics, 566 F. Supp. 177 (1983). This adoption of Pennsylvania's statute of limitations for breach of contract was thought to be in conformance with the pronouncements of this Court in Auto Workers v. Hoosier Corp., 383 U.S. 696 (1966).

These earlier lower court decisions applying Pennsylvania's six year statute were effectively overruled by Del

Costello. In that decision, this Court held that the appropriate statute to be applied in cases like Mr. Saville's is Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). By borrowing the federal limitations rather than that of the forum state, this Court effectively reduced from six years to six months the time in which a claimant may file a civil action.

Since Del Costello adopted a shorter statute of limitations than that prevailing when Mr. Saville's cause of action arose, it should not be applied to Mr. Saville if to do so would be inheritently unfair. In Chevron Oil Co. vs. Huson, 404 U.S. 97 (1971), this Court declined to apply a statute of limitations retroactively and set forth three factors which it deemed controlling:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."...Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." 404 U.S. at 106-107.

In Edwards v. Teamsters Local Union No. 36, 719 F. 2d 1036 (9th Cir 1983), the U.S. Court of Appeals for the Ninth Circuit held that Del Costello should not be retroactively applied. Relying upon the factors announced in Chevron Oil, the Court in Edwards noted that Del Costello signaled a clear departure from previous

holdings. Therefore, the first criterion of Chevron Oil had been met. With respect to the second factor, the Court noted:

> "We find that the reasons behind allowing actions against a union for the breach of its duty of fair representation would be disserved by barring suit by an employee when precedent existing at the time of filing permitted it." 719 F. 2d at 1040.

The Court, in summary, found that it would be inequitable to apply Del Costello retroactively.

In direct contradiction of Edwards v. Teamsters, the U.S. Court of Appeals for the Third Circuit has held that Del Costello should be applied retroactively. Perez v. Dana Corp. Parish Frame Div., 718 F. 2d 581 (3d Cir 1983). On the authority of the precedent in this Circuit set by the Perez case, the District Court dismissed Mr. Saville's complaint as it was bound to do.

In applying Del Costello retroactively, the Third Circuit in Perez relied upon factors which were not present in Mr. Saville's case. First, since Perez involved an appeal from an arbitrator's decision, the Court in that case would have been foreclosed, if not by Del Costello, then by the shorter Pennsylvania statute of limitations (governing arbitration decisions) on the authority of United Parcel Service Inc. v. Mitchell, 451 U.S. 56 (1981); and Liotta v. National Forge Co., 629 F. 2d 903 (3d Cir. 1980). Therefore, in Perez there was no inequity in applying the Del Costello rule, since Del Costello announced a longer, not shorter, statute than would have applied theretofore.

Unlike Mitchell and Liotta, Saville's was not an arbitration case. His grievance had never been submitted to arbitra-

tion. Accordingly, the short Pennsylvania statute governing arbitration awards would not have applied to him. See Christianson v. Pioneer Sand and Gravel Co., 681 F. 2d 577 (9th Cir. 1982). Rather, Pennsylvania's longer six year statute applicable to written contracts would apply. In the case of Mr. Saville, the inequity of applying the Del Costello rule to reduce his filing time from six years to six months is, it is submitted, apparent.

More important, a comparison of Perez and Edwards shows that the Third Circuit and Ninth Circuit have taken diametrically opposed positions concerning this question. In the interest of the uniform administration of the federal courts, this conflict should be resolved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

Donald M. McCurdy
221 N Olive St.
Media, PA 19063
(215) 566-8121

DAVID R. BLACK, ESQUIRE
221 North Olive Street
Media, PA 19063
(215) 566-8121
Attorney for Petitioner
Raymond L. Saville, Jr.

PROOF OF SERVICE

DAVID R. BLACK, on oath deposes and states that on the 19th day of June, 1985, three copies of the Petition for a Writ of Certiorari were served by first class mail, postage prepaid, on Robert Z. Lewis, Esquire at 11 East 51st Street, New York, New York 10022, and Dona S. Kahn, Esquire at Harris and Kahn, 14th Floor, 1600 Market Street, Philadelphia, Pennsylvania 19103, and Ira J. Katz, 1200 Walnut Street, Philadelphia, Pennsylvania 19107, and that all parties required to be served have been served.

DAVID R. BLACK, ESQUIRE
221 North Olive Street
Media, PA 19063
(215) 566-8121
Attorney for Petitioner

Subscribed and sworn to before
me this 19th day of June, 1985

Notary Public

Notary Public, Media, Delaware County
My Commission Expires May 15, 1985

APPENDIX

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1538

RAYMOND L. SAVILLE, JR.

Appellant

v.

WESTINGHOUSE ELECTRIC CORPORATION and UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA LOCAL 107

(Action No. 84-2523 - E.D. Pa.)
District Judge:
Honorable Charles R. Weiner

Submitted Under Third Circuit Rule 12(6)
March 20, 1985

BEFORE: SEITZ, HIGGINBOTHAM, Circuit Judges, and WEBER, District Judge.

JUDGMENT ORDER

After consideration of the contention raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is

hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Seitz
Circuit Judge

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: March 21, 1985

* Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on April 12, 1985.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND L. SAVILLE, JR.	:	
	:	
vs.	:	C.A. NO. 84-2523
	:	
WESTINGHOUSE ELECTRIC CORPORATION and UNITED ELECTRICAL RADIO and MACHINE WORKERS OF AMERICA LOCAL 107	:	

MEMORANDUM OPINION AND ORDER

WEINER, J. AUGUST 17, 1984

This action was brought by plaintiff, an electrical worker, against his former employer, Westinghouse Electric Corporation, ("Westinghouse") alleging unlawful employment termination, and against his union, the United Electrical Radio and Machine Workers of America, Local 107, ("Union") alleging unfair representation. Under Section 301 of the National Labor Management Relations Act of 1947 ("NLMRA"), an individual employee may in

one action charge his employer with the breach of the collective bargaining agreement and also charge his union with violating its duty to fairly represent him by mishandling the ensuing grievance procedure. Hines v. Anchor Motor Freight, 424 U.S. 554, 567 (1976); Vaca v. Sipes, 386 U.S. 171, 186-187 (1967).

Plaintiff was hired by Westinghouse on March 3, 1969 as a janitor's aide and was assigned to Westinghouse's Lester, Pennsylvania plant. As was required by his employment, plaintiff became a member of the Union. A collective bargaining agreement existed between Westinghouse and the Union during the time relevant to this case.

Plaintiff was mentally handicapped at the time of his employment. He was diagnosed as manic depressive, and took medication to control his illness. Plaintiff

was discharged on January 12, 1979 for insubordination.

Plaintiff filed a grievance with the Union in accordance with the collective bargaining agreement. Westinghouse did not address the grievance, and plaintiff requested the Union to take the case to arbitration. The Union notified plaintiff that they would not submit the case to arbitration. Plaintiff filed his complaint with this court on May 25, 1984.

Plaintiff alleges that Westinghouse discharged him because of his mental handicap which bore no relationship to his job performance, and that such discharge was in violation of Westinghouse's stated policy to employ qualified individuals without regard to physical or mental handicaps. Plaintiff charges the Union with violating its duty to fairly represent

him against the employer under an established grievance procedure.

Plaintiff requests a declaratory judgment that Westinghouse violated its policies in terminating him and a permanent injunction directing Westinghouse to reinstate him as of the date of termination with all back wages. Also, plaintiff requests $30,000 compensatory damages and $60,000 punitive damages from each of the defendants along with his costs and attorney's fees.

Presently before the court are defendants' motions to dismiss this case. Defendants argue that the complaint fails to state a claim upon which relief can be granted, and is barred by the applicable statute of limitations.

Section 301 of th NLRMA does not specifically indicate the statute of limitations applicable to actions thereunder.

Perez v. Data Corp., Parish Frame Div., 718 F. 2d 581, 583 (3d Cir. 1983). The Supreme Court has held that the applicable statute of limitations in an action by an employee against his employer and union alleging that the employer breached a provision of the collective bargaining agreement and that the union breached its duty of fair representation, is the six months limitations period set forth in 29 U.S.C. §160(B). DelCostello v. International Brotherhood of Teamsters, _____U.S._____, 103 S.Ct. 2281 (1983).

In the case sub judice, the plaintiff was discharged on January 12, 1979. The complaint was filed by him in this court on May 25, 1984. The complaint was therefore filed long after the six months limitation period set forth in 29 U.S.C. §160(B). Plaintiff however, argues that the ruling in DelCostello should be given

prospective application only, and therefore not be determinative of the case sub judice. We do not agree.

The Perez court in a well-reasoned analysis of the DelCostello decision, determined that DelCostello should be applied retroactively. 718 F.2d at 588. "Where a party gives such indications that he is sleeping on his rights, it is not inequitable to apply the statute of limitations retroactively to bar his claim." Id. Following that ruling, we find that the plaintiff's claim in the case sub judice alleging a violation of the collective bargaining agreement against Westinghouse, and a breach of duty of fair representation against the Union, having been filed more than five (5) years after his cause of action arose, is dismissed with prejudice as not being timely filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND L. SAVILLE, JR.	:	
	:	
vs.	:	C.A. NO. 84-2523
	:	
WESTINGHOUSE ELECTRIC CORPORATION and UNITED ELECTRICAL RADIO and MACHINE WORKERS OF AMERICA LOCAL 107	:	

AUGUST 17, 1984

ORDER

The motions of the defendants Westinghouse Electric Corporation and United Electrical Radio and Machine Workers of America Local 107 to dismiss the complaint are GRANTED.

The complaint of the plaintiff is DISMISSED with prejudice.

IT IS SO ORDERED.

/s/ Charles R. Weiner
Charles R. Weiner

OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-2034

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

RAYMOND L. SAVILLE, JR.,
Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION,
AND
UNITED ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA LOCAL 107,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Dona S. Kahn, Esquire
Alison Pease, Esquire
Attorneys for Respondent
Westinghouse Electric Corp.

Of Counsel:
HARRIS AND KAHN
Suite 1416
1600 Market Street
Philadelphia, PA 19103
(215) 568-4202

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984
No.

RAYMOND L. SAVILLE, JR.,
Petitioner,
v.
WESTINGHOUSE ELECTRIC CORPORATION,
and
UNITED ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA LOCAL 107,
Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION

I. QUESTION PRESENTED

Did the Court of Appeals err in upholding the district court's retroactive application of the holding of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), and its dismissal of the complaint as untimely since it was not filed within the six month statute of limitations set forth in 29 U.S.C. §160(b)?

II. STATEMENT OF THE CASE

Petitioner, Raymond L. Saville, Jr., was hired on May 3, 1969, as a sweeper by respondent Westinghouse Electric Corporation and assigned to its facility in Lester, Pennsylvania. As a condition of his employment, Mr. Saville became a member of the United Electrical, Radio & Machine Workers of America, Local 107, the other respondent in this case. On January 12, 1979, Mr. Saville was fired for insubordination.

Throughout the more than nine and a half (9-1/2) years of his employment with Westinghouse, Mr. Saville was a troublesome employee. His work was often poor, and he had recurring disciplinary problems. Mr. Saville is a manic-depressive, and because of his mental illness respondent Westinghouse made every effort to help Mr. Saville keep his job. On several

occasions, when the symptoms of his illness were severe, the company granted him leave and disability benefits. After the symptoms subsided, Mr. Saville was allowed to return to work. Finally, however, Mr. Saville's bizarre behavior and insubordination required Westinghouse to dismiss him.

The events leading to his dismissal are undisputed. On January 10, 1979, management and union representatives met with petitioner to discuss his failure to clean certain washrooms. At this meeting, petitioner was extremely uncooperative. When the meeting broke for lunch he entered the building where the washrooms were located with a six foot "2-by-4." He returned to his job but refused to return to the meeting. At that point Westinghouse reassigned petitioner to another job.

Two days later, on January 12, 1979, Mr. Saville, without authority and without cause, closed a women's washroom. In an apparent effort to discourage entrance to the washroom, he put a crude, scatological sign on the door. As a result of the incident, Westinghouse suspended Mr. Saville for an indefinite period. When he refused to attend a meeting with management and union representatives to discuss these problems, he was dismissed from his job effective January 12, 1979.

Respondent Westinghouse did not act precipitously in firing Mr. Saville. Rather, in the more than nine and a half (9-1/2) years of his employment at Westinghouse, the company exhibited great patience with Mr. Saville's irratic behavior. It gave him special treatment and consideration because of his mental

illness. He received disability payments even though in one incident he had voluntarily resigned. Also, over the years, at Mr. Saville's request, Westinghouse had reassigned him to different jobs and various work areas. In fact, respondent was in the process of reassigning petitioner once again when the incident involving the women's washroom occurred. At that time, Mr. Saville had just returned from a disciplinary suspension which had resulted from another incident of insubordination during which he had used abusive and threatening language with his supervisor and union shop steward.

Thereafter, petitioner filed a grievance through his union under terms of the collective bargaining agreement. The union did not pursue the grievance procedure; therefore, his claim was never taken to arbitration. By his own account,

petitioner did not ask the union about the status of his grievance until approximately a year after he had filed the original grievance. (Petition at p.7). Five years and four months after his discharge, on May 25, 1984, he filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the two respondents.

Mr. Saville alleges what is commonly known as a hybrid 301 - fair representation claim.[1/] He contends that Westinghouse, his former employer, breached the collective bargaining agreement when it fired him from his job on January 12, 1979, and that the union breached its

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1. The action was brought under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a).

duty of fair representation by failing to pursue his grievance.[2/]

The district court granted the motions to dismiss filed by Westinghouse and the union. Relying upon this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the court found that the applicable statute of limitations for the case was the six month period set forth in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). The complaint was dismissed as untimely. The

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2. Petitioner contends that Westinghouse breached one of its written, personnel guidelines, which states in relevant part: "It is the policy of Westinghouse to employ qualified individuals without regard to physical or mental handicaps or degree of handicap which are not relevant to satisfactory job performance." (Petition at p.5) (emphasis added.) In this case, petitioner's mental illness continually had interfered with the satisfactory performance of his job.

United States Court of Appeals for the Third Circuit affirmed, without an opinion, the judgment of the district court dismissing the complaint.

III. SUMMARY OF ARGUMENT

This Court should decline to exercise its discretion to review the dismissal of petitioner's complaint. Contrary to petitioner's assertion, there is not a substantial conflict among the federal courts of appeals regarding the retroactive application of the holding of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) finding that the six month statute of limitations in the NLRA should govern §301 actions against employers and unions. Of the ten circuit courts which have addressed the question, nine have held that there

should be retroactive application of the new rule regarding the applicable statute of limitations announced in DelCostello, supra. The position of the Ninth Circuit, which has refused to apply DelCostello retroactively in any case where to do so would shorten the limitations period, is not a sound one. Not only is it a distinctly minority view, but given that the Ninth Circuit has applied DelCostello retroactively to lengthen a limitations period, it is a position which seems to be result-oriented.

An additional reason for denying the Writ in this case is that the lower courts correctly applied the law and reached a just and fair determination of the issues.

IV. REASONS FOR DENYING THE WRIT

A. ANY CONFLICT AMONG THE COURTS OF APPEALS IS NOT SIGNIFICANT ENOUGH TO WARRANT THIS COURT'S ATTENTION.

Petitioner urges this Court to exercise its discretion and grant certiorari in this case because of a "serious conflict" among the federal courts of appeals involving the question of the retroactive application of the holding of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).[3/] (Petition at p.9). Petitioner, however, cites only two opinions, Edwards v. Teamsters Local Union #36, 719 F.2d 1036 (9th

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3. In DelCostello, supra, this Court held that six months statute of limitations in §10(b) of the NLRA should govern Section 301 actions against both the employer and the union. There is no federal statute of limitations specifically applicable. Prior to DelCostello, the federal courts had applied various state statutes of limitations to these cases.

Cir. 1983), cert. denied ____ U.S. ____, 104 S.Ct. 1599 (1984) and Perez v. Dana Corporation Parish Frame Division, 718 F.2d 581 (3rd Cir. 1983), in support of his claim that the conflict among the federal appellate courts is substantial enough to justify review by this Court.

Respondent Westinghouse disputes that there is a "serious conflict" among the federal courts of appeals on this question. To date ten federal courts of appeals have decided this issue; all but one, the Ninth Circuit, have held that the decision should have retroactive application.[4/] When such an overwhelming number of courts favor one position, there is not

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4. See Smith v. General Motors, Inc., 747 F.2d 372 (6th Cir. 1984); Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir.

(FOOTNOTE 4 CONTINUED ON NEXT PAGE)

a "serious conflict." Rather, the position taken by the Ninth Circuit on this issue can be characterized as a clearly minority view. Given that the great preponderance of federal appellate courts favor retroactive application, the issue is not worthy of this Court's time and attention.[5/]

(FOOTNOTE 4 CONTINUED)

1984); Perez v. Dana Corp., 718 F.2d 581 (3d Cir. 1983); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Storck v. International Brotherhood of Teamsters, 712 F.2d 1194 (7th Cir. 1983); Lincoln v. District 9, 723 F.2d 627 (8th Cir. 1983); Hand v. International Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983). But see Edwards v. Teamsters Local Union #36, 719 F.2d 1036 (9th Cir. 1983).

5. Indeed, this Court has declined to address the issue of the retroactivity of DelCostello on at least three occasions. See Edwards v.

(FOOTNOTE 5 CONTINUED ON NEXT PAGE)

Also, in two recent opinions, the Ninth Circuit has modified its position that the DelCostello holding should not be applied retroactively. In Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1985), the court of appeals affirmed the district court's application of the six month statute of limitations set forth in DelCostello, which resulted in the dismissal of the hybrid-301 fair representation action as untimely. The Ninth Circuit held that the six months period should apply in this

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(FOOTNOTE 5 CONTINUED)

Teamsters Local Union #36, 719 F.2d 1036 (9th Cir. 1983), cert. denied _____ U.S. _____, 104 S.Ct. Reporter 1599 (1984); Welyczko v. U.S. Air, 733 F.2d 239 (2d Cir. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 512 (1984); McNaughton v. Billingham Corporation, 722 F.2d 1459 (9th Cir. 1984), cert. denied _____ U.S. _____, 105 S.Ct. 291 (1984).

case because "the retroactive effect of DelCostello is to lengthen, not shorten, the time in which Glover could have filed." 746 F.2d. at 1382. In Glover, the applicable state statute of limitations was Oregon's twenty (20) day limitation period for vacation of arbitration awards.

In Aragon v. Federated Department Stores, Inc., 750 F.2d 1547 (9th Cir. 1985), another panel of the Ninth Circuit applied the DelCostello holding retroactively. In Aragon, the state statute of limitations which would have applied was California's 100 day limit on filing suits to vacate an arbitration award. The plaintiff's suit was time-barred regardless of which of the two limitations period applied; however, the Aragon court held that since the application of DelCostello would lengthen

rather than shorten the period, it should be applied retroactively.

The opinions in Glover and Aragon, supra, suggest that the Ninth Circuit is more concerned with result than with an even, consistent interpretation of the law. The divergent positions taken by that court on the retroactivity of Del-Costello cast further doubt upon the reasonableness of its minority position on this issue.

B. GIVEN THE FACTS OF THE CASE, REVIEW OF THE ISSUE OF THE RETROACTIVITY OF DELCOSTELLO WOULD NOT BE APPROPRIATE.

An important premise of petitioner's claim that this Court should grant discretionary review of the dismissal of his case is that when his cause of action arose the federal courts in Pennsylvania "uniformly applied" the Pennsylvania six year statute of limitations found at 42

Pa. C.S.A. §5527(2).[6] Petitioner argues that he relied upon supposedly consistent caselaw in failing to file his complaint for over five years after his firing.

A review of the decisions of the Third Circuit and the district courts in Pennsylvania shows, however, that no such consistency existed. In support of his contention, petitioner cites only three cases: Falsetti v. Local Union #2026, U.M.W. 249 F.Supp. 970 (1965), aff'd 355 F.2d 658 (3d Cir. 1966); Sellers v. Spiegel, Inc., 551 F.Supp. 235 (E.D.Pa. 1982) and Melin v. Arcata Graphics, 556 F.Supp. 177 (W.D.N.Y. 1983). Any reliance by petitioner on these decisions was not reasonable. First, three decisions hardly

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6. It is petitioner's view that the six year statute governed because a §301 action was most analogous to an action based upon a contract. (Petition at pp.3, 11).

constitute a definitive precedent. Second, the decision in Melin, supra, did not apply Pennsylvania law and was not decided by a federal court sitting in Pennsylvania. Also, language in the Falsetti decision should have put petitioner on notice that the law regarding which state statute of limitations would apply was not settled.

The Third Circuit in Falsetti affirmed the lower court's finding that the plaintiff's hybrid-301 fair representation case was barred by the Pennsylvania six year statute of limitations governing personal actions. The court did note, however, that:

> It may well be, however, that at least in a case such as this, where the facts were susceptible of triggering National Labor Relations Board action on unfair labor practice grounds, that the state statute of limitations would cause undesirably lingering litigation in light of the six month federal statute of limitations governing

> unfair labor practices.... 335 F.2d at 662.

This comment presaged this Court's holding in DelCostello. In any event, this observation in Falsetti should have alerted petitioner that he could not assume that the Pennsylvania six year statute of limitations would govern his §301 claim. This is particularly true since subsequent decisions both of the Third Circuit and of this Court raised serious doubts about the applicability of a six year statute of limitations in a hybrid-301 - fair representation case.

For example, in Liotta v. National Forge Company, 629 F.2d 903 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981), the Third Circuit held that the three month statute of limitations of Pennsylvania's General Arbitration Act, 5 P.S. §173, would apply to the 301 suit

brought by Mr. Liotta against his employer for an alleged breach of the collective bargaining agreement. Soon after, this Court found in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), that the state statute of limitations period that should be borrowed and applied to an employee's §301 action against his employer was the limitations period for actions to vacate arbitration awards. This Court specifically rejected the employee's argument that his action against his employer was one for breach of contract:

> ... thus respondent's characterization of his actions against the employer as one for 'breach of contract' ignores the significance that it was brought in the District Court pursuant to §301(a) of the LMRA and that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the Union breached its

> duty of fair representation. 451 U.S. at 62.

This language gave notice to all potential 301 claimants that their actions against their employers were not analogous to a breach of contract claim and that the state statutes of limitations governing contracts therefore would not apply.

C. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THIS CASE AS THE LOWER COURTS CORRECTLY APPLIED THE LAW.

The crucial issue in this case is whether the determination of the district court and the court of appeals that the holding of DelCostello should apply was the correct one. An appellate court must apply, as a general rule, the law in effect at the time it makes its decision. Gulf Off Shore Company v. Mobile Oil Corporation, 453 U.S. 374, 486 n.16 (1981). This Court followed that general rule in

DelCostello, supra. It determined a new rule of law, i.e., the six months statute of limitations found in 29 U.S.C. §160(b) should govern §301 actions against both the employer and the union, and then applied this new rule to the case before it. Both the Sixth Circuit, in Smith v. General Motors Corporation, 747 F.2d. 372 (6th Cir. 1984) (en banc), and the Second Circuit, in Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984), cert. denied, ____ U.S. ____ 105 S.Ct. 1512 (1984), have found that the holding of DelCostello should be applied retroactively because this Court chose in DelCostello to apply the new rule to the case before it, which amounted to a retroactive application of a new statute of limitations.

As petitioner points out, however, the traditional means of determining whether a decision should be applied

retroactively in a civil case is to undertake the three step analysis set forth in Chevron Oil Company v. Huson, 404 U.S. 97, 106-07 (1971). This Court directed in the Chevron case that three issues be addressed: (1) does the decision represent a "clear break" with past law; (2) would retroactive application further or retard operation of the new rule; and (3) could retroactive application "produce substantial and inequitable results." Id.

In Perez v. Dana Corporation Parish Frame Division, 718 F.2d 581 (3rd Cir. 1983), the decision relied upon by the district court in this case, the Third Circuit used the Chevron analysis to find that DelCostello should be applied retroactively. See also Scott v. Local 863, International Brotherhood

of Teamsters, 725 F.2d 226, 228-229 (3d Cir. 1984).

As the Third Circuit pointed out in Perez, supra, analysis done under the first prong of the Chevron decision clearly favors retroactive application of DelCostello since there was no "clear past precedent on which the litigants may have relied." 718 F.2d at 585. The Perez court found that the caselaw in the Third Circuit and in the other courts of appeals on the issue of the applicable statute of limitations for hybrid-301 fair representation actions was erratic and inconsistent.[7/] Id. at 586. The Perez court described the caselaw regarding the applicable statute of limitations in a §301

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7. The Perez decision also pointed to the comment in Falsetti, supra, that suggested that the six month limitations period in the NLRA might apply to some §301 actions.

action as "a legally chaotic situation." Id., quoting Lawson v. Truck Drivers Local Union #100, 698 F.2d 250, 254 (6th Cir. 1983). It found that any reliance on this uncertain caselaw would not be reasonable, particularly in light of the decision in United Parcel Service v. Mitchell, supra and Liotta v. National Forge Company, supra, discussed above.

The second prong of the Chevron analysis requires a court to determine whether retroactive application would further or retard operation of the new rule. As the Third Circuit pointed out in the Perez decision, retroactive application of the six months limitation period would appear to serve the purposes, identified by this Court, underlying the holding of DelCostello: (1) the need for uniformity; (2) the need to provide an aggrieved employee with satisfactory

opportunity to vindicate his rights; and (3) the desire for relatively rapid final resolution of labor disputes. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 162, 168-171 (1983).

The final prong of the Chevron analysis requires consideration of whether application of the new rule would be inequitable. In the instant case, as in the Perez case, no inequity has occurred by applying the holding of DelCostello.[8/] In this case, the petitioner waited five

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8. In his brief, petitioner incorrectly attempts to distinguish the facts of his case from those found in Perez v. Dana Corporation Parish Frame Division, 718 F.2d 581 (3rd Cir. 1983). The petitioner writes that the Perez case involved an appeal from an arbitrator's decision. This is simply not correct. Like petitioner, Mr. Perez unsuccessfully requested his union to submit to arbitration his claim that his employer had breached the collective bargaining agreement. 718 F.2d at 583.

years and four months after his dismissal from Westinghouse to file an action in federal court. By his own account, he waited almost a year to find out whether the union had pursued his grievance. Moreover, from the time of his dismissal in January 1979 until the determination by this court in DelCostello in 1983, the caselaw regarding the applicable statute of limitations in hybrid-301 fair representation cases was "legally chaotic." Given the decision in Liotta, supra, in 1980, petitioner should have been on notice that it was possible that Pennsylvania's ninety (90) day statute of limitations for vacation of arbitration awards might apply to his case. In any event, the caselaw in the federal courts of Pennsylvania was not such when the alleged

cause of action accrued,[9/] in either 1979 or 1980, that Mr. Saville reasonably could have believed that he could sit on his rights for over five years and preserve his §301 claims against the union and his former employer.

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9. It is unclear when petitioner's alleged cause of action for breach of the collective bargaining agreement accrued. However, the decision in Scott v. Local 863, International Brotherhood of Teamsters, 725 F.2d 226, 228 (3d Cir. 1984), holds that a cause of action accrues when the plaintiff realizes the futility of any further internal appeal procedure with the union. In this case, petitioner's cause of action under that reasoning, accrued sometime in early 1980.

V. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondent
Westinghouse Electric Corporation

DATE

OF COUNSEL:

HARRIS AND KAHN
14th Floor
1600 Market Street
Philadelphia, PA 19003

Pursuant to Rule 28.1 the following are partially owned subsidiaries of Westinghouse Electric Corporation, Inc.:

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51. CMW Sistemas, Ltda. (CMWS) (Westinghouse do Brasil S.A. (WEBSA))

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83. Westinghouse, S.A.

84. Ateliers de Constructions Electriques de Charleroi S.A. (ACEC) (Westinghouse World Investment Corporation)

85. Galileo Argentina, C.I.S.A. (Westinghouse World Investment Corporation)

86. Galileo Uruguaya, S.A. (Westinghouse World Investment Corporation)

87. Mitsubishi Electric Corporation

PROOF OF SERVICE

DONA S. KAHN, ESQUIRE, on oath deposes and states that on the day of July, 1985, three copies of the Petition for Writ of Certiorari were served by first class mail, postage prepaid, on David R. Black, Esquire, 221 North Olive Street, Media, PA 19063, and Robert Z. Lewis, Esquire, 11 East 51st Street, New York, New York 10022, and Ira J. Katz, Esquire, 1200 Walnut Street, Philadelphia, PA 19107, and that all parties required to be served have been served.

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondent
Westinghouse Electric Corp.

SUBSCRIBED AND SWORN TO
before me this day
of July, 1985.

NOTARY PUBLIC

OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-2034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND L. SAVILLE, JR.,

Petitioner,

VS.

WESTINGHOUSE ELECTRIC CORP. and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 107,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 107 IN OPPOSITION

ROBERT Z. LEWIS
11 East 51st Street
New York, N.Y. 10022
(212) 753-1960

IRA J. KATZ
1200 Walnut Street
Philadelphia, PA 19107
(215) 735-2410

Attorneys for the Union

Counterstatement of the Question Presented

Should this Court grant this Petition for Writ of Certiorari to review a decision of the United States Federal Court of Appeals for the Third Circuit affirming the dismissal by a federal district court of a complaint on the ground that it had not been filed within the six month limitation period established by this Court in *Del Costello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983) and applied retroactively in accordance with *Perez* v. *Dana Corporation, Parish Frame Division*, 718 F.2d 581 (1983)?

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claim" or a "Vaca-Hines action". *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Both defendants moved to dismiss on the ground, *inter alia*, that the action was barred by the applicable statute of limitations. The District Court, by Memorandum Opinion and Order (Petitioner's Appendix, pp. 3, 7), dated August 17, 1984, dismissed the Complaint as untimely because it had been filed long after the lapse of the six month limitation period set forth in 29 U.S.C. Section 160(b) and adopted for *Vaca-Hines* suits by this Court in *Del Costello, supra*. The Court of Appeals for the Third Circuit affirmed without opinion by Judgment Order dated March 21, 1985 (Petitioner's Appendix, p. 1) and applied the *Del Costello* six month limitation period retroactively in accordance with *Perez* v. *Dana Corporation, supra*.

Sixty-four months elapsed between the Petitioner's discharge and the filing of the Complaint. According to the Complaint, the Union had failed, refused or neglected to pursue the grievance filed against Westinghouse's discharge action and by reason of this failure to pursue the contractual grievance procedure the Union had denied the Petitioner the opportunity to present the grievance to an arbitrator (Union Respondent's Appendix, p. 6a, paragraphs XI, XIII). Thus, the cause of action accrued shortly after the discharge, and it is obvious that the six month limitation period of *National Labor Relations Act* 29 U.S.C. § 160(b) had been exceeded.

The Petition, however, states that Saville learned "more than a year after he was terminated" that the Union had decided not to take his grievance to arbitration although it had promised to do so (Petition, p. 7). Assuming the truth of this assertion, *arguendo*, it is clear that the Complaint was filed more than four years after Saville alleged that he had learned of the Union's refusal to arbitrate. Here, too, the six month limitation period had been exceeded.

Thus, the facts of this case are practically identical in all respects with those considered by the Third Circuit Court in *Perez, supra*, except that the Petitioner here delayed in taking his Complaint to court for a far longer period than that confronted by the Third Circuit in *Perez*. Despite the belief of Petitioner (Petition, p. 15), *Perez* does not involve an appeal from an arbitrator's decision. There had been no arbitration in the *Perez* case, as there has been none in this proceeding.

Reasons for Denying the Writ

Petitioner argues that the Writ should be granted because of a serious conflict between the Courts of Appeals of the Third and Ninth Circuits about retroactive application of the six month period of limitation adopted by this Court in *Del Costello, supra*, June 8, 1983. *Perez* v. *Dana Corporation, supra; Edwards* v. *Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983, cert. den. 104 S.Ct. 1599). Petitioner also states that *Perez* is in conflict with lower court decisions in other circuits, citing *Woolett* v. *Bankers Life Co.*, 572 F. Supp. 650 (E.D. Michigan, 1983). However, the Court of Appeals for the Sixth Circuit has held, since *Woolett* issued, for retroactive application of *Del Costello*. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (1984).

The Petitioner urges that the *Edwards* approach be accepted and that, if it were to be, the state's statute of limitations he contends is appropriate would be the six years applied to written contracts (42 Pa., C.S.A., Section 5527(2)).

The Writ should be denied for the reasons stated below.

The Petition suggests a cataclysmic polarity between the Third and the Ninth Circuits exclusively. But the Ninth Circuit is alone in withholding retroactive application in *Del Costello*. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and

11th Circuits have held otherwise. *Graves* v. *Smith's Transfer Corp.*, 736 Fed. 819 (1st Cir., 1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2nd Cir. 1984); *Perez* v. *Dana Corp., Parish Frame Division*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Landahl* v. *PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984); *Storck* v. *International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9*, 723 F.2d 627 (8th Cir. 1982); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983); *Hand* v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983).

Most of the circuit courts applying *Del Costello* retroactively did so upon the basis of the analysis provided to them by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971). This three-part analysis asks: (1) whether the decision represents a "clear break" with past law; (2) whether retroactive application would further or retard operation of the new rule; and (3) whether retroactive application would "produce substantial inequitable results." However, two of the circuit courts found it to be unnecessary to apply the *Chevron* analysis because of their belief that the Supreme Court had implicitly held in *Del Costello* that the statute of limitations should be applied retroactively by barring the claims that were in front of the Court. *Smith* v. *General Motors Corp., supra* (p. 375); *Welyczko* v. *U.S. Air, Inc., supra* (p. 240). In *Rogers* v. *Lockheed-Georgia Co.*, the 11th Circuit Court of Appeals recognized that *Del Costello* and its companion case, *United Steel Workers* v. *Flowers*, 462 U.S. 151, 103 S.Ct. 2281 (1983) had given retroactive application to its ruling, but the 11th Circuit also applied the *Chevron* analysis.

The *Perez* and *Edwards* courts both applied the *Chevron* test for retroactivity. In the 3rd Circuit it was determined

that there was no clear past precedent on which *Perez* could have reasonably relied in waiting 23 months to file his suit. *Perez, supra* (at pp. 585-586). Of course, *Saville* had no clear past precedent on which to rely for waiting 48 to 64 months in which to file his Complaint. The 9th Circuit decided, however, in *Edwards, supra* (at p. 1040), that *Del Costello* effectively overruled the specific case, *Price* v. *Southern Pacific Transportation Co.*, 568 F.2d 750, 753 (1978) which constituted a precedent for using a three-year statute of limitations in the case of a discharged employee suing a union for its failure to fairly represent. The 9th Circuit found that *Edwards* could reasonably have relied on *Price* in filing his action. *Edwards, supra* (p. 1040). There appears to be a conflict in the results between *Perez* and *Edwards*, but not one of principle.

That an analysis of the state of the decisional law in one circuit may lead to different conclusions from an analysis of the decisional law of another circuit when the difference rests in variation between the decisional law of each, should create neither wonder nor a conflict between circuits warranting the attention of this Court.

Moreover, the limitation period in the 3rd Circuit relative to *Vaca-Hines* actions, prior to the issuance of *Del Costello*, may have been that applicable in actions to vacate arbitration awards. *Perez, supra* (at p. 583). This period is shorter than the 10(b) limitation period adopted in *Del Costello*. The 9th Circuit would apply *Del Costello* retroactively in this situation because it does not regard retroactive application of a longer limitation period to be inherently unfair. *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir., 1984); *Edwards* v. *Teamsters Local No. 36, supra* (at p. 1040).

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons indicated.

Respectfully submitted,

ROBERT Z. LEWIS
11 East 51st Street
New York, N.Y. 10022
(212) 753-1960

IRA J. KATZ
1200 Walnut Street
Philadelphia, PA 19107
(215) 735-2410

Attorneys for the Union

Dated: July 18, 1985.

APPENDIX

Complaint for Damages, Injunctive and Declaratory Relief, and Other Appropriate Relief: Demand for Jury Trial

David R. Black, Esquire
221 North Olive Street
Media, Pennsylvania 19063
(215) 566-8121
I.D. 24405

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

Civil No.

Raymond L. Saville, Jr.
22-1 Sandalwood Drive
Newark, Delaware 19713

Plaintiff

vs.

Westinghouse Electric Corporation
Lester, Pennsylvania 19113

and

United Electrical Radio and Machine Workers of America, Local 107
710 East Third Street
Essington, Pennsylvania 19029

I

Nature of the Case

This is an action brought by an electrical worker against his former employer, Westinghouse Electric Corporation

(hereinafter WESTINGHOUSE) and the UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA (hereinafter ELECTRICAL WORKERS), alleging that he was unlawfully terminated as a result of his former employer's practices of discrimination on the basis of mental handicap in violation of the employer's own stated policies. In addition, Plaintiff alleges claims for damages for breach of the written collective bargaining agreement between WESTINGHOUSE and ELECTRICAL WORKERS.

By this action Plaintiff seeks money damages for lost wages and benefits, liquidated, compensatory and punitive damages, and injunctive and declaratory relief, including orders requiring Defendant WESTINGHOUSE to reinstate Plaintiff, and requiring Defendant ELECTRICAL WORKERS to proceed through its grievance procedure to have Plaintiff reinstated by WESTINGHOUSE, and requiring Defendant WESTINGHOUSE to take action to modify its practices affecting Plaintiff which result in unlawful discrimination based on handicap.

II

JURISDICTION

Jurisdiction over this action is based upon Title 28 U.S.C. §1332 (diversity of citizenship), 1337, 1343 (4).

III

Plaintiff is a citizen of the State of Delaware. Defendant WESTINGHOUSE is a corporation incorporated under the laws of the State of Pennsylvania and having its principal place of business in the State of Pennsylvania. Defendant ELECTRICAL WORKERS is an unincorporated association having its principal place of business in the State of Pennsyl-

vania. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

IV

FIRST CLAIM FOR RELIEF

Saville vs. Westinghouse

Plaintiff was hired by Defendant WESTINGHOUSE in March of 1969 for the position of janitor's aide and assigned to Defendant's plan facility at Lester, Pennsylvania. On January 12, 1979, after a total of nine years and ten months of wholly satisfactory, competent and diligent performance of duties to his employer's profit, Plaintiff was terminated by Defendant WESTINGHOUSE on the basis of a mental handicap which bore no relation to his job performance.

V

Defendant's termination of Plaintiff was undertaken in violation of Defendant's own stated policies of employing qualified individuals without regard to physical or mental handicaps; the termination also violated the written agreement then in effect between Defendant WESTINGHOUSE and Defendant ELECTRICAL WORKERS, dated June 16, 1973, respecting the employment of Union members which included Plaintiff.

VI

From time to time during Plaintiff's employment with Defendants, Defendant Westinghouse published its personnel policies and procedures, including a document titled "Reaffirmation of the Handicapped/Veterans Policies". This published document states:

Complaint for Damages, Injunctive and Declaratory Relief, and Other Appropriate Relief: Demand for Jury Trial

It is the policy of Westinghouse to employ qualified individuals without regard to physical or mental handicaps or degrees of handicap which are not relevant to satisfactory job performance. Westinghouse will take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment including the executive level, and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: hiring, up-grading, demotion or transfer; recruitment or recruiting advertising; layoff or termination; rates of pay or other forms of compensation; selection for training.

These commitments were further supplemented by other written and oral commitments to Plaintiff which all became part of the total employment agreement between Plaintiff and Defendant Westinghouse.

VII

As a proximate result of Westinghouse's breach of its agreement with Plaintiff and its willful, knowing and intentional discrimination against Plaintiff, Plaintiff has sustained and continues to sustain substantial losses in earnings, retirement benefits, and other employment benefits and has suffered and continues to suffer humiliation and mental and physical pain and anguish, all to his damage in a sum exceeding thirty thousand dollars.

In light of Defendant's willful, knowing and intentional discrimination against Plaintiff, Plaintiff seeks an award of liquidated damages equal to the amounts found owing and an award of punitive damages in the amount of sixty thousand dollars.

Complaint for Damages, Injunctive and Declaratory Relief; and Other Appropriate Relief: Demand for Jury Trial

VIII

Plaintiff has no plain, adequate, or complete remedy at law to address the wrongs alleged herein, and this suit for declaratory and injunctive relief, as well as compensatory and punitive damages, is his only means of securing adequate relief.

IX

Second Claim for Relief

Saville vs. Electrical Workers

Defendant Electrical Workers is a labor union certified by the National Labor Relations Board as the lawfully designated exclusive bargaining representative of electrical workers employed by Defendant Westinghouse. Since the beginning of Plaintiff's employment for Defendant Westinghouse, Defendant Electrical Workers has served as the exclusive representative of Plaintiff for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

At the time of accepting employment with Defendant Westinghouse, Plaintiff was required to become a member of Defendant Electrical Workers. Plaintiff did, in fact, become a member of Electrical Workers and thereafter remained a member of in good standing at all times during his employment. Plaintiff duly paid dues as required by Defendant's rules and otherwise complied with all of Defendant's rules and regulations generally applicable to members.

X

On or about June 16, 1973, Defendant Electrical Workers, acting for its members, including Plaintiff, reached a cer-

tain written collective bargaining agreement with Defendant Westinghouse concerning pay and conditions of employment.

The Agreement states at page three:

> SECTION IV—DISCRIMINATION
>
> 3. The Union agrees that neither it nor its locals nor the respective officers and members, nor persons employed directly or indirectly by the Union or its Locals will discriminate against any employee. . . .

The Agreement also established a grievance procedure and a procedure for arbitration of disciplinary matters. Under these procedures, Defendant Electrical Workers was to represent such of its members who became involved in any dispute arising out of their employment at Westinghouse.

XI

At the time Plaintiff was wrongfully terminated by Defendant Westinghouse on January 12, 1979, Plaintiff filed a grievance with Defendant Electrical Workers in accordance with Defendant's rules and regulations but, despite Plaintiff's request of Defendant for assistance in pursuing this grievance, Defendant Electrical Workers failed, refused or neglected to pursue Plaintiff's grievance against Defendant Westinghouse.

XIII

By reason of the failure of Defendant Electrical Workers to represent Plaintiff by following the grievance procedures provided by the Agreement between Defendant Westinghouse and Defendant Electrical Workers, Plaintiff has been denied the opportunity to present his grievance

to Defendant Westinghouse or to a neutral arbitrator, and therefore has been denied the opportunity to be reinstated in his employment. As a proximate result of Defendant Electrical Workers' breach of its Agreement with Plaintiff and its fiduciary duty as exclusive representative of Plaintiff, Plaintiff has sustained and continues to sustain substantial losses in earnings, retirement benefits and other employment benefits and has suffered and continues to suffer humiliation and mental and physical pain and anguish, all to his damage in a sum exceeding thirty thousand dollars ($30,000.00). Plaintiff seeks an award of liquidated damages equal to the amounts found owing and, owing to the breach by Electrical Workers of its fiduciary duty to Plaintiff, Plaintiff seeks an award of punitive damages in the amount of sixty thousand dollars ($60,000.00).

WHEREFORE, Plaintiff Raymond L. Saville, Jr., prays for judgment in its favor and requests that the Court grant to it the following relief against Defendants Westinghouse Electric Corporation and United Electrical Radio and Machine Workers of America:

A. Enter a declaratory judgment that Defendant Westinghouse violated its own policies, agreements and covenant of fair dealing, with Plaintiff in terminating Plaintiff's employment;

B. Enter a permanent injunction enjoining Defendant Westinghouse and directing Defendant Westinghouse to reinstate Plaintiff to the employment from which he was terminated without a break in service and to restore to him all wages, retirement benefits, and other employment benefits due from his date of termination;

C. Award to Plaintiff money damages in a sum in excess of thirty thousand dollars ($30,000.00) in compensa-

tory damages and a sum in excess of sixty thousand dollars ($60,000.00) in punitive damages;

D. For Defendant Electrical Workers' breach of its Agreement with Plaintiff and its fiduciary duty toward Plaintiff, award to Plaintiff money damages in excess of thirty thousand dollars ($30,000.00) for compensatory damages and in excess of sixty thousand dollars ($60,000.00) in punitive damages;

E. Award to Plaintiff his costs of suit, including reasonable attorneys fees;

F. Award to Plaintiff such other and further relief as the Court deems just and proper.

Dated: 5/17/84

Respectfully submitted,

/s/ David R. Black
David R. Black, Esquire
221 North Olive Street
Media, Pennsylvania 19063
(215) 566-8121
Attorney I.D. 24405

Attorney for Plaintiff
Raymond L. Saville, Jr.

OPINION

(3)

SUPREME COURT OF THE UNITED STATES

LAWRENCE FEIN *v.* PERMANENTE MEDICAL GROUP

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 85–19. Decided October 15, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE WHITE, dissenting.

Cal. Civ. Code Ann. § 3333.2 (West) establishes a $250,000 maximum limitation in medical malpractice actions for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damage." This statute is part of the Medical Injury Compensation Act of 1975, enacted by the California legislature in response to the dramatic rise in consumer medical costs caused by the increase in both monetary awards in medical malpractice actions and medical malpractice insurance premiums. See 1975 Cal. Stats 2d Ex. Sess. ch. 2, § 12.5(1)(b).

Appellant brought a medical malpractice action against appellee, Permanente Medical Group, a partnership of physicians, for failing to diagnose and prevent a myocardial infarction. The jury awarded appellant total damages of $1,287,783, including $500,000 for noneconomic losses. The trial judge, however, pursuant to § 3333.2, reduced the amount of noneconomic damages to $250,000.

The California Supreme Court affirmed, rejecting appellant's challenge that § 3333.2 contravenes both the Due Process and Equal Protection clauses of the federal Constitution. The court found no Due Process violation based on the theory that "the Legislature retains broad control over *the measure* as well as *the timing* of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legis-

lature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." *Fein* v. *Permanente Medical Group*, 38 Cal. 3d 137, 158, 695 P. 2d 665, 680 (1985) (emphasis in original). The court then reasoned that the limitation imposed by § 3333.2 was a rational response to the problem of rising medical malpractice insurance costs.

Similarly, the court found that § 3333.2 did not improperly discriminate either between medical malpractice plaintiffs and other tort plaintiffs, or within the class of medical malpractice plaintiffs by denying full recovery to those with noneconomic damages exceeding $250,000. The Legislature's decision to limit the application of § 3333.2 to medical malpractice cases, and within those cases to those with large noneconomic damage awards, the court reasoned, was a rational response to escalating malpractice insurance rates.

California thus joins Indiana as the only two states to uphold the constitutionality of this type of medical malpractice damage limits. See *Johnson* v. *St. Vincent Hospital, Inc.*, 404 N. E. 2d 585, 598–601 (Ind. 1980). Four other states which have addressed similar damage limitations have invalidated the challenged provisions on federal constitutional grounds. *Baptist Hospital of Southeast Texas* v. *Baber*, 672 S. W. 2d 296, 298 (Tex. App. 1984) ($500,000 limit on damages other than medical expenses); *Carson* v. *Maurer*, 120 N. H. 925, 941–943, 424 A. 2d 825, 836–838 (1980) ($250,000 limit on "noneconomic" damages); *Arneson* v. *Olsen*, 270 N. W. 2d 125, 135–136 (ND 1978) ($300,000 limit on total damages); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Ops. 3d 164, 166, 355 N. E. 2d 903, 906–907 (Com. Pl. 1976) ($200,000 limit on "general" damages).*

*In addition, at least one other court has struck down a similar medical malpractice damage cap as violative of its state constitution. *Wright* v. *Central DuPage Hospital Association*, 63 Ill. 2d 313, 329–330, 347 N. E. 2d 736, 743 (1976). Cf. *Jones* v. *State Board of Medicine*, 97 Idaho 859, 877, 555 P. 2d 399 (1976) (remanding for factual determination on whether a medical malpractice "crisis" actually existed in Idaho to justify adoption of damage limitation).

One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59 (1978). In that case, the Court upheld the provisions of the Price-Anderson Act 42 U. S. C. § 2210 (1983 ed.) which place a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. One of the objections raised against the liability limitation provision was that it violated Due Process by failing to provide those injured by a nuclear accident with an adequate quid pro quo for the common law right of recovery which the Act displaced. The Court noted that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here. . . ." *Id.*, at 88 (footnote omitted).

The North Dakota Supreme Court in *Arneson*, *supra*, followed *Duke Power Co.*, and refused to hold that the legislature may not limit a pre-existing right without providing a quid pro quo. 270 N. W. 2d, at 134–135. Nevertheless, the court went on to find that the imposition of a damage cap on malpractice claims did not provide a sufficient quid pro quo for the severely injured malpractice plaintiff, as his loss of recovery was offset only by lower medical costs for all recipients of medical care, and he received no specific benefit in return. *Id.*, at 136, citing *Wright* v. *Central DuPage Hospital Association.*, 63 Ill. 2d 313, 328, 347 N. E. 2d 736, 743 (1976). This approach has been followed by the courts in Texas and New Hampshire. See *Baptist Hospital of Southeast Texas*, *supra*, 672 S. W. 2d, at 298; *Carson*, *supra*, 120 N. H., at 941–943, 424 A. 2d, at 837–838. In the instant case, however, the California Supreme Court concluded that "it would be difficult to say that the preservation of a viable

medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." 38 Cal. 3d, at 160, n. 18, 695 P. 2d, at 681–682, n. 18.

Whether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more states will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.